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8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 PETITION TO AMEND RULES 7, 8, 10,  
11 10.1, 10.2, 15.1, 15.2, 18, 19, 22, 26, 26.1,  
12 27.1, 28, 29, 29.2, 30, 30.1, 30.2, 30.3,  
13 30.4, 33, 38, ARIZONA RULES OF  
14 PROBATE PROCEDURE, and RULE 31,  
15 ARIZONA RULES OF THE SUPREME  
16 COURT

Supreme Court No. R-11-0023

**Comment of the State Bar of  
Arizona on Petition to Amend  
Arizona Rules of Probate  
Procedure and Arizona Rule of  
the Supreme Court 31**

17 The State Bar Of Arizona, upon the recommendation of the Probate and  
18 Trust Section and the Elder Law and Mental Health Section, recommends against  
19 the adoption of petitioner's proposed Rule 30.1 of the Arizona Rules of Probate  
20 Procedure and recommends making certain changes to petitioner's proposed  
21 Rule 30.3 of the Arizona Rules of Probate Procedure and proposed amendment to  
22 the Statewide Fee Guidelines for Assessing the Reasonableness of Fiduciary,  
23 Guardian *Ad Litem*, and Attorney Compensation in Title 14 Proceedings.

24 In addition, the State Bar of Arizona, upon the recommendation of its  
25 Committee on the Rules of Professional Conduct, recommends making changes to  
26 petitioner's proposed Rule 10.1 of the Arizona Rules of Probate Procedure and its  
comment focusing on the proposals that impact ER 4.2.

The State Bar believes that adoption of the proposals set forth herein will  
improve the functioning of the system of justice.

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## COMMENT

Rule 30.1 – Good Faith Estimate. The State Bar respectfully recommends that Rule 30.1 not be adopted as a Rule of Probate Procedure for the following reasons:

1. The Arizona statutes and procedures regarding conservatorships and protective proceedings represent a balance of the right to due process for the person allegedly in need of protection and the measured authority for the court to intervene and limit the subject person's liberties when protection is needed and is in the best interest of that person.

2. In order to appoint a conservator or enter a protective order, the court must make a finding that the subject person:

is unable to manage the person's estate and affairs effectively for reasons such as mental illness, mental deficiency, mental disorder, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance [and] the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by the person and that protection is necessary or desirable to obtain or provide funds. (A.R.S. § 14-5401(2)(a) and (b)).

The expenditure of effort, time and expense in meeting the requirements of Rule 30.1 may prove premature in advance of the court making a determination as to the necessity of appointing a conservator.

3. Prior to the issuance of such an order by the court, neither the petitioner nor the conservator nominee has the legal authority to obtain financial information regarding the subject person. It is only after completion of the statutory due process procedures, and after notice and a hearing, that a conservator is granted specific authority to obtain financial

1 information regarding the subject person and to manage that person's estate.  
2 Having no legal authority to interfere in the financial affairs of the subject  
3 person prior to issuance of a court order, the petitioner will generally be  
4 unable to obtain information regarding the financial affairs of the subject  
5 person and provide meaningful and accurate estimates of anticipated costs  
6 and financial obligations regarding that person. Efforts to gather such  
7 information prior to the appointment of a conservator will most likely result  
8 only in increased expenses for the estate with no real benefit to the subject  
9 person.

10 4. Proposed Rules 30.2, 30.3, and 30.4, regarding the financial order, the  
11 sustainability of the conservatorship, and the conservatorship estate budget,  
12 provide necessary and important requirements that should both increase  
13 protection for the subject person's estate and assist the fiduciary and the  
14 court in the prudent management of the estate. Requiring the conservator to  
15 file a budget not later than the date the inventory is due (proposed Rule 30.4)  
16 is the most reasonable first step in the budgeting process. As required by  
17 A.R.S. § 14-5418, within ninety days after appointment, the conservator  
18 should be able to have located, identified, and valued the subject person's  
19 assets and liabilities, and will have the legal authority to obtain such  
20 information. These rules provide adequate protection to the subject person's  
21 estate without the need for Rule 30.1.

22 5. Proposed Rules 30.4 and 38, read together, require the conservator to  
23 complete and file a budget with the court within ninety days of appointment  
24 and mandate that the budget be prepared in the format set forth in Form 6.  
25 "Conservator's 90 Day Report" must include the Inventory, Statement of  
26 Receipts and Disbursements, Statement of Net Assets, Statement of

1 Sustainability of Conservatorship, and supporting details. If these forms are  
2 completed and submitted to the court and to interested persons as required,  
3 both the court and the interested persons will have detailed information  
4 regarding the estate funds expended within the initial ninety-day period, as  
5 well as the proposed budget for the first accounting period. In addition,  
6 SB1499, which was recently enacted as A.R.S. § 14-5109, requires any  
7 guardian, conservator, attorney, or guardian *ad litem* who intends to seek  
8 compensation from the estate of a ward or protected person to give written  
9 notice of the basis for such compensation from the estate when the guardian,  
10 conservator, attorney, or guardian *ad litem* first appears in the case and to  
11 update the notice at least thirty days prior to changing the basis of  
12 compensation. Proposed Rule 30.4.E. authorizes an interested person to file  
13 a written objection to the budget within fourteen days after the filing date of  
14 the budget. Any concerns regarding the first budget can then be dealt with  
15 quickly and efficiently, as the conservator will have real and recent  
16 familiarity with the subject person's estate and the legal authority to remedy  
17 problems in this regard.

18 6. Proposed Rule 30.4 further requires that the conservator submit the  
19 first budget "following consultation with any attorney or guardian ad litem  
20 for the protected person." In addition, Rule 30.2 provides that "[u]ntil  
21 discharged, the protected person's attorney has a continuing duty to review  
22 the conservator's inventory, budgets and accounts and to notify the court of  
23 any objections or concerns." Such consultation and review should ensure  
24 that the subject person's interests and concerns will be advocated and  
25 addressed by his or her attorney, including consideration of the "dignity  
26 funds" to be disbursed to the subject person. As that person is generally not

1 represented by counsel prior to the court appointment of an attorney  
2 following the filing of a petition to appoint a conservator, Rule 30.4 already  
3 provides adequate and important safeguards to ensure that the subject person  
4 is not disadvantaged in the important budgeting process.

5 7. The extensive changes requested in the proposed amendments to the  
6 Arizona Rules of Probate Procedure, if approved, should establish important  
7 processes and safeguards for protected persons. Proposed Rule 10.2  
8 (Prudent Management of Costs) requires a fiduciary to “. . . prudently  
9 manage costs, preserve the assets of the ward or protected person for the  
10 benefit of the ward or protected person, and protect against incurring any  
11 costs that exceed probable benefits to the ward, protected person, decedent’s  
12 estate or trust . . . ”. The proposed Rule 30.1, which requires good-faith  
13 estimates at the time the petition is filed, will merely increase expenses  
14 without providing any real benefit or protection for the subject person, and  
15 should not be adopted.

16 Rule 30.3 – Sustainability of Conservatorship.

17 1. Proposed Rule 30.3 requires the conservator to “. . . disclose whether  
18 the annual expenses of the conservatorship exceed income and, if so,  
19 whether the assets available to the conservator less liabilities are sufficient to  
20 sustain the conservatorship during the projected lifespan of the protected  
21 person.” Attention to the sustainability of a conservatorship estate is an  
22 important requirement for a conservator. However, there is no information  
23 or guidance in the proposed rules regarding the source of information for the  
24 “projected lifespan” of the subject person.

25 2. Proposed Rules 30.3 and 38, when read together, require the  
26 conservator to file the sustainability disclosure in the format set forth in

1 proposed Forms 6, 7, 8, and 10. The instructions for line 11 of Form 6 state  
2 that the conservator must:

3 [e]nter your good faith estimate of the remaining life expectancy  
4 of the protected person expressed in years. Just tell the court  
5 what you think, not what you can prove. You may rely on your  
6 own experience, any opinions that you consider credible, such as  
7 the opinions of a medical professional, and life expectancy  
8 tables. However, do not use life expectancy tables without  
9 making adjustments for the particular circumstances of the  
10 protected person based upon the information that is reasonably  
11 available to you.

12 3. In order to provide consistency in the projected lifespan data and a  
13 useful resource for the conservator in estimating the lifespan for a particular  
14 subject person, the State Bar recommends that the proposed rule state the  
15 specific life expectancy table that must be used if the conservator chooses to  
16 use a life expectancy table (e.g., the most recent Social Security Period Life  
17 Table), and provide a link in the court's Self-Service Center or elsewhere to  
18 the website for the mortality table (e.g., [http://www.ssa.gov/OACT/](http://www.ssa.gov/OACT/STATS/table4c6.html)  
19 [STATS/table4c6.html](http://www.ssa.gov/OACT/STATS/table4c6.html)). Notwithstanding that Rule 30.3 specifies a life  
20 expectancy table to be used in those cases in which the use of a table to  
21 determine life expectancy is appropriate, life expectancy may be determined  
22 in a manner other than by the use of a table as appropriate, given that wards  
23 and protected persons often have a shortened life expectancy or a life  
24 expectancy that otherwise varies significantly from what is projected in a  
25 standardized table.  
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1 Proposed Statewide Fee Guidelines for Assessing the Reasonableness of  
2 Fiduciary, Guardian *Ad Litem*, and Attorney Compensation in Title 14  
3 Proceedings.

4 1. The point of reference guideline 3.D(4) states “Preparation of  
5 Conservator’s Account and Budget: Five (5) Hours Per Year.” This estimate  
6 of a reasonable guideline is seriously understated, and the State Bar  
7 respectfully requests that no numerical guideline be set. Instead, we  
8 recommend that the Court take into account that the time spent on  
9 preparation of the conservator's account and budget will vary significantly in  
10 each case, and a court should take into account factors such as (a) the size of  
11 the estate assets, (b) the types and number of assets held, (c) the amount of  
12 annual activity in the conservatorship, and (d) the difficulty in obtaining  
13 records and compiling the accounting and its supporting information.

14 2. As stated in the introduction, the Guidelines are “intended to assist the  
15 court, fiduciaries, guardians *ad litem*, attorneys, parties, and interested  
16 persons in evaluating whether compensation is reasonable . . . ”. The  
17 Guidelines set forth compulsory billing standards, general compensation  
18 factors, and “points of reference” which the court must consider, when  
19 considering hourly rates and charges, as non-binding but informative and  
20 persuasive considerations.

21 3. Proposed Rules of Probate Procedure 30.4 and 38, read together,  
22 require the conservator to complete and file a budget with the court within  
23 ninety days of appointment and mandate that the budget be prepared in the  
24 format set forth in Form 6. The “Conservator’s 90 Day Report” must  
25 include the Inventory, Statement of Receipts and Disbursements, Statement  
26 of Net Assets, Statement of Sustainability of Conservatorship, and  
supporting detail. The average time needed to gather the necessary

1 information and prepare just the annual conservatorship accounting is often  
2 in excess of ten hours, and for large, complicated, or active estates, can  
3 exceed twenty hours. These detailed budgeting, reporting, and accounting  
4 requirements add substantially more time to the process.

5 Rule 10.1 – ER 4.2 Implications

6 With respect to the Rule 4.2 implications, proposed Rule 10.1 and the  
7 comment provide that on motion by the fiduciary's attorney, "the court may  
8 authorize the fiduciary to appear without legal representation in a particular court  
9 proceeding and communicate with any opposing counsel *in connection with that*  
10 *proceeding.*" Proposed Rule 10.1(C) (emphasis added). The comment goes on to  
11 say that when the represented fiduciary appears without the attorney of record  
12 pursuant to this rule, other counsel may communicate with the fiduciary *in*  
13 *connection with that proceeding only* without violating the attorney's ethical  
14 obligation" under ER 4.2. Proposed Comment to Rule 10.1(C) (emphasis added).

15 The concern is that the phrase "in connection with that proceeding," as used  
16 in the proposed rule and comment, is ambiguous and might be interpreted to mean  
17 not just communications occurring during the court proceeding but  
18 communications leading up to it and communications afterwards concerning any  
19 issues raised at the proceeding. Although the comment suggests that such  
20 communications would not involve "contested issues," that limitation isn't clear or  
21 well defined. The lack of clarity on the scope and timing of permitted  
22 communications puts the fiduciary at risk of improper communications, and also  
23 puts the communicating lawyer at risk of running afoul of Rule 4.2's restrictions.

24 The issue could be resolved by modifying the rule to state that "the court  
25 may authorize the fiduciary to appear without legal representation in a particular  
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1 court proceeding and to communicate with any opposing counsel during that  
2 proceeding.”

3 The comment could be modified to state that “other counsel may  
4 communicate with the fiduciary during that proceeding without violating the  
5 attorney’s ethical obligation mandated by Ariz. R. Sup. Ct. 42, ER 4.2.  
6 Communications leading up to the proceeding or following the proceeding,  
7 whether oral or in writing, should continue to be made through the fiduciary’s  
8 attorney of record as required by ER 4.2.

9 **Conclusion**

10 Based upon the above, the State Bar of Arizona believes that: (1) by not  
11 adopting Rule 30.1 – Good Faith Estimate, and by adopting the State Bar’s  
12 proposed amendment to Rule 30.3 and proposed amendment to the Statewide Fee  
13 Guidelines for Assessing the Reasonableness of Fiduciary, Guardian *Ad Litem*, and  
14 Attorney Compensation in Title 14 Proceedings; and (2) by adopting the State  
15 Bar’s proposed amendment to Rule 10.1 and its comments, the best interests of the  
16 system of justice would be served, which is a stated goal of the State Bar of  
17 Arizona.

18 RESPECTFULLY SUBMITTED this 22<sup>ND</sup> day of September, 2011.

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21   
22 John A. Furlong  
General Counsel

23 Electronic copy filed with the Clerk  
24 of the Supreme Court of Arizona  
this 22nd day of September, 2011.

25  
26 By: 

1 A copy was mailed to:

2 Lorraine Smith

3 Arizona Judicial Council

4 Arizona Supreme Court

5 1501 W. Washington Street

6 Phoenix, Arizona 85007-3327

7 this 22nd day of September, 2011.

8 By: Amé B. DePalma

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